

Isolated Wetlands

The purpose of this document is to summarize how isolated wetlands are currently regulated in Washington.

How do Isolated Wetlands Affect WSDOT Projects?

Based on a U.S. Supreme Court ruling in 2001, federal agencies no longer regulate isolated wetlands that may occur in WSDOT project areas. However, a direct hydrologic connection between any wetland and any tributary is all that is needed to establish federal wetland jurisdiction. Since the decision, the courts have, in most cases, rejected a broad interpretation that only limits federal jurisdiction to wetlands immediately adjacent to a “truly” navigable water.

However, the court ruling did not change Washington state wetland laws. The state Clean Water Act (90.48 RCW) makes no distinction between types of wetlands. Rather, state law covers all “waters of the state”, in which isolated wetlands are included. As a result, the Washington State Department of Ecology (Ecology) uses Administrative Orders to protect isolated wetlands that the federal government no longer regulates.

What is an Isolated Wetland?

The U.S. Army Corps of Engineers (Corps) has previously considered isolated wetlands to be those that are not adjacent to or connected via surface water to a navigable water body, such as a river, lake or marine waters. Isolated wetlands, therefore, have a very specific type of hydrologic isolation—they do not have a surface outlet by which water leaves the wetland, even seasonally, to another water body.

Some indicators of isolated wetlands include (Carson, 2004):

- A wetland fed by a spring that does not empty into any off-site area.
- Wetland hydrology based exclusively on seasonable precipitation and localized runoff from adjacent uplands.
- No definable drainage features that would allow the wetland to drain any nearby man-made or natural drainages.
- A wetland surrounded on all sides by a significant increase in elevation and upland soils.
- No signs of a discrete surface water conveyance carrying water out of the wetland (e.g., no channels or signs of regular sheet flow).
- A ditch segment dug in uplands that does not exhibit evidence of flowing water nor show any downstream connection with other waters of the U.S.
- Wetlands surrounded on all sides by upland soils and upland vegetative communities.

What Authority Does Washington State Have to Regulate Wetlands?

Two state laws authorize the Washington State Department of Ecology to regulate wetlands (Ecology, 1998; McMillan, 1998):

- **State Water Pollution Control Act** (Chapter 90.48 RCW). The State Water Pollution Control Act (Act) mandates the protection of all uses and benefits of water including the water supply, commerce and navigation, recreation, fish and wildlife habitat, and aesthetics. The Act gives Ecology “jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of Washington State.” Although the Act does not specifically mention wetlands, all wetlands are surface or underground water, or both.

The State Water Pollution Control Act identifies Ecology as the lead state agency for implementing provisions of the federal CWA including Section 401. Section 401 requires Ecology to review and certify dredge and fill activities permitted under Section 404 of the CWA. Proposed projects must meet state water quality standards. The Surface Water Quality Standards (Chapter 173-201A WAC) describe implementation of these laws. These standards include a federally mandated antidegradation policy (Chapter 173-201A-070 WAC). This policy provides the primary means for protecting water quality in Washington wetlands.

- **Shoreline Management Act** (Chapter 90.58 RCW). The Shoreline Management Act (SMA) regulates only those wetlands within 200 feet of shoreline water bodies and wetlands “associated” with these water bodies. Some isolated wetlands may fit this category.

What has been the Result of the SWANCC Decision?

In January 2001, the U. S. Supreme Court limited the federal government’s authority to regulate intrastate, isolated wetlands in the *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (SWANCC) decision. The court ruled in 2001 that the Clean Water Act (CWA) does not apply to those “isolated” wetlands where only interstate commerce connection is use by migratory birds. A Corps permit is still required for isolated wetlands with other interstate commerce use (e.g., recreation, industrial) and wetlands that are connected to navigable waters.

Prior to the SWANCC decision, permits from the Corps were needed to fill most isolated wetlands. Also prior to the SWANCC decision, Ecology issued both a 401 certification and an Administrative Order with Section 404 permits. Ecology continues to issue Administrative Orders for wetlands. In Ecology’s view, any project that fills or alters an isolated wetland that is non-jurisdictional under Section 404 of CWA is still subject to regulation by the state (Ecology, 2001).

According to Sheldon et al. (2005), the Seattle District of the Corps does not have any national or regional guidance for making isolated wetland determinations. As of November 2004, if a wetland meets the test of “adjacency” (i.e., neighboring, bordering, or contiguous) with any navigable water, or if the wetland has a surface outlet that drains to a navigable water, then the Corps will not consider the wetland isolated (T.J. Stetz, U.S. Army Corps of Engineers, Seattle, personal communication 2004). Future court or administrative decisions may change how the Corps determines isolated wetlands.

According to Ecology (2001), any project that calls for filling or altering a wetland determined by the Corps to be isolated will still be subject to regulation by the state. The state's process for reviewing projects that involve isolated wetlands will be different from the 401 Water Quality Certification process that is triggered by the Corps' 404 permit. Rather, Ecology will use Administrative Orders to regulate projects that will have impacts to isolated wetlands. The standards of review will remain the same as under 401 water-quality certifications—that is, the state water-quality standards for surface waters (WAC 173-201A). For more information about the review standards, see Ecology (1998) and McMillan (1998).

Ecology's authority to regulate isolated wetlands through the Administrative Order process has yet to be challenged. Questions remain. For example, guidance that explains how Ecology decides whether alteration of a wetland or a specific type of wetland mitigation meets the antidegradation requirement in the State Water Pollution Control Act is lacking. Also, the criteria Ecology uses to determine whether isolated wetlands have been sufficiently protected remains unclear (Carson 2004).

Since the SWANCC decision, Washington State along with 11 other states have made attempts to address the issue of isolated wetlands. These efforts have had varying degrees of success. While Minnesota, Massachusetts, New Hampshire, and Wisconsin have developed a comprehensive set of state wetland statutes, North Carolina, Washington, and California use water quality statutes to address wetlands. Oregon and Maryland use a combination of statutes to derive their authority (Christie and Hausmann 2003).

What is the Current Process to Permit Impacts to Isolated Wetlands?

The general steps in the process to permit unavoidable impacts to isolated wetlands are summarized below. These steps are the result of direct experience with the Corps and Ecology. Applicants should also be aware that all wetlands in Washington are regulated under the state's Growth Management Act. Most cities and counties in Washington will require local approval for effects on isolated wetlands. Many cities and counties do not explicitly exempt isolated wetlands. Therefore, the permit process will likely vary depending on the site-specific situation and local jurisdiction.

General Process:

1. **WSDOT Delineates Wetland.** WSDOT delineates wetlands within a project area and evaluates whether any may be considered isolated. If a wetland fails the "adjacency" test (neighboring, bordering or contiguous) with any navigable water, or if the wetland does not have a surface outlet that drains to a navigable water, then it may be isolated.
2. **WSDOT Requests a Jurisdictional Determination.** If the wetland could be considered "isolated," WSDOT requests a jurisdictional determination from the Corps, Ecology, and any local jurisdiction (city or county). This can be done by submitting a letter requesting that the regulatory agencies review the wetland to verify that it is isolated.

3. **Corps Concurs with Isolated Wetland Determination.** If the Corps determines the wetland to be isolated, they will document their determination in a letter, which they will share with Ecology.
4. **WSDOT Requests an Administrative Order from Ecology.** To request an Administrative Order for a project that involves isolated wetlands, applicants should contact the Permit Assistance Center at the Department of Ecology at (800)917-0043, (360)407-7037, or ecypac@ecy.wa.gov. The process involves completing Ecology's "Isolated Wetlands Information Sheet" and submitting it with any reports or documents that provide supporting information, such as the delineation report. The "Isolated Wetlands Information Sheet" can be downloaded from: <http://www.ecy.wa.gov/programs/sea/pac/pdf/IsolatedWetlandsInfoSheet.pdf>
5. **Ecology Issues Administrative Order.** If Ecology concurs with the isolated wetland determination, they will issue an Administrative Order to WSDOT.

Literature Cited

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